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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections	)	MM Docket No. 92-266
of the Cable Television	)	
Consumer Protection and	)	
Competition Act of 1992	)	
	)	
Rate Regulation	)	

COMMENTS OF THE JOINT PARTIES

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SUMMARY

"Effective competition" is a defined term in the 1992 Cable Act. In the 1984 Cable Act Congress deferred to the Commission the task of defining effective competition; this time Congress chose to specify its intent in clear statutory language. The Commission does not have legal authority to disregard the "unambiguously expressed intent of Congress" and effectively rewrite an express provision of the law. Nor may it "accept" the Congressional language for one purpose — determining which systems are subject to regulation — and ignore that language for the purpose of calculating rates under its benchmark formula.

To the extent, then, that the Commission is relying on the rates of systems subject to effective competition in setting its benchmarks, the rates of certain of those systems cannot be excluded from the Commission's calculus. Indeed, the Commission's error in looking at competitive system rates lies not in the inclusion of certain systems but, rather, in its decision to look at average rates. If rates of competitive systems are to play a role in defining benchmarks, it is the rates at the high end, not the average, that should be used as a touchstone. Otherwise, systems not subject to competition could face rollbacks where they charge the same rates as "competitive" systems with above average prices. The Commission also failed to follow the express Congressional directive that it consider all statutory factors in establishing reasonable rates.

As a practical matter the Commission has indicated that the exclusion of rate data from one group of systems subject to effective competition would substantially reduce benchmark levels. Further rollbacks would have a devastating impact on cable

systems and cable subscribers. Drastic rollbacks could place many systems in financial peril or plunge them into bankruptcy. Congress envisioned adoption of a regulatory regime that would protect consumer interests. It did not signal the financial ruin of the industry. To the contrary, Congress expressly stated its intent that cable operators continue to expand their capacity and the programs offered to subscribers.

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COMMENTS OF THE JOINT PARTIES

Cablevision Industries Corporation, Comcast Cable Communications, Inc., Cox Cable Communications, a division of Cox Communications, Inc., Jones Intercable, Inc., Marcus Cable Company, L.P., Southwest Missouri Cable TV, Inc. and Vista Communications, Inc. (collectively, the "Joint Parties"), by their attorneys, hereby submit comments in the above-captioned proceeding.[1/] The Joint Parties are a diverse group of cable operators with large and small cable systems across the country. The breadth of their operations gives them valuable experience with which to evaluate the Commission's proposals in this proceeding and the effects these proposals would have on the cable industry. The Joint Parties urge the Commission not to adopt the proposals in the Further Notice.

I. INTRODUCTION

On May 3, 1993, the Commission released its combined Report and Order and Further Notice in this proceeding. The Report and Order promulgated benchmarks to be used to evaluate cable television rates. The benchmarks are based on the rates of

1/ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Further Notice of Proposed Rulemaking, MM Dkt. No. 92-266, (released May 3, 1993) (the "Further Notice").

systems the Commission believes to be subject to effective competition. The added). The Commission also is required to consider the rates for cable systems subject to effective competition in determining whether rates for cable programming services are unreasonable. 47 U.S.C. § 543(c)(2) ("the Commission shall consider, among other factors . . . the rates for cable systems, if any, that are subject to effective competition. . . .") (emphasis added). Although the Commission is instructed to consider systems subject to effective competition with respect to both cable programming and basic tier services, Congress prescribed a separate set of factors for determining the rates for each.

The statutory definition of the term "effective competition" includes situations in which "fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system. . . ."[2/] In the Further Notice, the Commission seeks comment on whether it can, in effect, rewrite Congress' definition of "effective competition" to exclude systems with customer penetration below 30 percent of the households in a service area for purposes of setting benchmark rates. We submit

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2/ 47 U.S.C. § 543(*l*)(1). The other definitions which are not relevant here, define effective competition as existing where:

(B) the franchise area is —

(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

(ii) the number of households subscribing to programming services offered by multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or

(C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.

that, to the extent that any of this data is relevant, the Commission has no authority to exclude these systems from those that are used to establish benchmark rates.

As the Supreme Court said, "the starting point for interpreting a statute is the language of the statute itself."[3/] The language used by Congress in the 1992 Cable Act compels the Commission to consider each factor enumerated in the statute. Because "shall . . . is the language of command," inclusion of the systems which have less than 30 percent penetration is mandatory.[4/]

The ACLU court, which reviewed the Commission's implementation of the 1984 Cable Act, considered the specific question whether the Commission could "craft" a definition that "depart[ed] materially from that set forth in the statute. . . ."[5/] As the court posed the question:

> Does the FCC enjoy discretion to adopt, as part of its regulations implementing the Cable Act, a definition of a particular term that is at odds with a definition of that very term contained in the Act itself?

3/ Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); see also American Civil Liberties Union v. F.C.C., 823 F.2d 1554, 1568 (D.C. Cir. 1987), cert. denied 485 U.S. 959 (1989) ("ACLU") ("it is beyond cavil that the first step in any statutory analysis, and our primary interpretive tool, is the language of the statute itself").

4/ MCI Telecommunications Corp. v. F.C.C., 765 F.2d 1186, 1191 (D.C. Cir.

> The question, we believe, answers itself. The Commission, however, answers yes.

Id. at 1567. The court, which followed the statute's mandate, found the Commission's definition "contrary to law" because Congress had "spoken directly and specifically by providing a definition of the exact term the Commission [sought] to redefine."[6/]

The ACLU court rested its decision, in part, on the Supreme Court's directive in Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984): "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress."[7/] Despite the instruction of Chevron and ACLU, and without citing any authority in support of its position, the Commission again proposes to ignore an express statutory definition and create an alternative definition. This course of action is contrary to law and foreclosed both by the plain words of the statute and the ACLU holding.[8/]

6/ Id. at 1570. Unlike the Commission's interpretation in ACLU, which would have narrowed the application of its regulations, the Commission's current attempt to redefine a statutory term would greatly expand the impact of its regulation of the cable industry. In the present case, the Commission is attempting to implement a monumental rate reduction with potentially disastrous consequences for the industry and its customers without any affirmative Congressional directive and in contravention of explicit statutory language. See Part V, infra.

7/ Id.; see also Illinois Bell Telephone Co. v. F.C.C., 966 F.2d 1478, 1481 (D.C. Cir. 1992) (court did not defer to Commission's interpretation of statute when Congressional intent was clear); Wolverine Power Co. v. F.E.R.C., 963 F.2d 446, 449-50 (D.C. Cir. 1992) (where Congress has spoken to the question at issue, the court's "task is at an end").

8/ Not only is the statutory language unambiguous, the legislative history of the 1992 Cable Act illustrates that Congress did not intend for the Commission to define effective competition. Section 623(b) of the 1984 Cable Act specifically directed the

(continued...)

Moreover, the Commission's proposed course of action would run counter to Congress' expressed intent in a far more intrusive manner than its attempt to redefine the definition of a basic cable service in the ACLU case. Here, the Commission proposes to write out of the statute an entire prong of the effective competition definition, which, in turn, would have ruinous consequences for an entire industry. Additionally, the adoption of the definition as proposed in the Further Notice would, in effect, render the benchmark system of no utility because the choice between benchmark and cost-of-service regulation would be no choice at all. The new benchmarks would be so draconian that virtually all cable television operators would be forced to file cost-of-service showings — a result not favored by the Commission.[9/]

The Commission, in order to justify its departure from the statute's plain language of the statute, asserts that eliminating this component of the definition "may

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8/ (...continued)
Commission to define the circumstances in which a system is subject to effective competition. The Commission adopted standards pursuant to this authority — the legislative history of the 1992 Cable Act, however, states that these standards failed to achieve their purposes. See H.R. Rep. No. 102-268, 102d Cong., 2d Sess., at 31-34 ("House Report") ("the FCC's redefinition of effective competition [in 1991] does not obviate the need for a legislative approach to protecting consumers.") In response to these concerns, the 1992 Cable Act amended Section 623 by eliminating the Commission's authority to define effective competition and by providing a statutory definition of effective competition that clearly is intended to supersede any Commission action.

9/ The Commission's rate rollback rules were designed to avoid cost-of-service showings; the Commission recognized that requiring "steep rate reductions" would encourage "unweidly[sic] and expensive cost-of-service showings" and sought to remedy that problem by calling for reductions based on September 30, 1992 rates instead of reductions to benchmark levels. Further Notice at ¶ 219.

produce a better measure of competitive rate differential." Further Notice at ¶ 561.[10] The plain meaning of a statute cannot be ignored by an agency, or trumped by assertions of what Congress "would have done" had it been aware of certain "facts." As the D.C. Circuit remonstrated the Commission in MCI: "authorization must come from Congress, not from this court or from the Commission's own conception of how the statute should be rewritten in light of changed circumstances."[11] Because an agency cannot empower itself to do what the legislature has chosen not to let it do, the Commission's proposed action would be arbitrary, capricious and in violation of the law. 5 U.S.C.A. § 706(2)(A) (1977).

B. The Definition of Effective Competition Must Be Applied in a Consistent Manner.

Although the Commission uses the statutory definition of effective competition to determine which systems are subject to regulation,[12] it proposes, to ignore the statute for purposes of computing its benchmarks. Congress did not empower the

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10/ Although it has been suggested that Congress would have altered its definition of effective competition if the Commission's rate survey data had been available, the statute is clear. The Commission cannot act on assumptions about what Congress might have done.

11/ MCI, 765 F.2d at 1195. The Commission also has acknowledged this basic principle of administrative law: "[Where] the Commission has affirmative commands from Congress . . . [t]he agency has no authority to ignore these commands, even if market forces arguably are present which undercut the . . . justification for regulation." Id. at 1193 (quoting Brief of Federal Communications Commission at 49-50, AT&T v. F.C.C., 572 F.2d 17 (2d. Cir 1977), cert. denied, 439 U.S. 875 (1978)).

12/ See 47 C.F.R. § 76.905 (effective October 1, 1993) ("A cable system is subject to effective competition when any one of the following conditions is met . . . [f]ewer than 30 percent of the households in its franchise area subscribe to the cable service of a cable system . . . ").

Commission to expand and contract the class of systems subject to effective competition. Instead, it directed the Commission to encompass in the definition of effective competition those systems that have less than 30 percent penetration for purposes of rate regulation.

Congress would have structured the statute differently if it had intended the term "effective competition" to apply only when determining which systems should be subject to regulation. For example, Congress would not have included the defined term "effective competition" in its list of factors which must be considered in setting rates. Congress' use of effective competition in this manner underscores its expectation that the Commission would give effect to the statutory definition of effective competition in reaching rate determinations. Wolverine Power Co., 963 F.2d at 450 (the court could assume that Congress used a term in one section of a statute in the same way it defined it in another part of the statute).

The language of the 1992 Cable Act plainly applies the definition of effective competition in Section 623(*l*)(1) (fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system) to the term as used in Section 623(b)(2)(C)(i) (the Commission shall take into account the rates for systems that are subject to effective competition). The provision defining effective competition in Section 623(*l*) specifically states that it applies to the term "as used in this section." The section in which the definition appears contains provisions stating that only systems not subject to effective competition may be regulated, 47 U.S.C. § 543(b)(1); listing the seven factors for the Commission to consider in setting reasonable rates, 47 U.S.C. § 543(b)(2)(C); and listing the factors to be considered in determining if cable programming rates are unreasonable. 47 U.S.C. § 543(c)(2). The statutory language could not be more explicit and therefore must be given effect. See ACLU, 823 F.2d at 1568.

III. THE COMMISSION IS OBLIGATED TO CONSIDER DATA FROM SYSTEMS WITH LESS THAN 30 PERCENT PENETRATION.

The Commission tentatively concluded that, because the rates of systems with less than 30 percent penetration differ from those of systems under the second and third statutory tests, they may be disregarded. Further Notice at ¶ 563.[13/] The Commission suggests that "low penetration of cable systems may be attributable to factors other than the presence of competing video distribution systems."[14/] Even if this suggestion were true, the Commission could not substitute its judgment for that of Congress by disregarding the data on rates of low penetration systems. Had Congress intended to give the Commission such broad authority, it would have done so explicitly.[15/] The statute does not so empower the Commission. As discussed above, the fact that Congress considered effective competition to be present when fewer than 30 percent of a franchise area's households subscribe to cable service requires the inclusion of these systems in the Commission's rate study.

13/ The second and third tests are described in note 2, supra.

14/ Further Notice at ¶ 561. The Commission mentions several reasons, other than competition, why a system may have low penetration. It does not, however, provide any evidence that these factors are present in any of the systems surveyed.

15/ See, e.g., 47 U.S.C. § 534(f) (granting the Commission general authority to issue regulations implementing the 1992 Cable Act's must carry provisions); see also ACLU, 823 F.2d at 1564 (noting that the 1984 Act provided no guidance on what factors the Commission should consider in defining the term "effective competition").

Moreover, systems that fall under the second and third prongs of the effective competition test may be the ones that "behave differently,"[16] and with potentially adverse and inappropriate consequences for the remainder of the industry. For example, systems facing overbuilds operate under unique circumstances. As described in the Comments filed by the NCTA, systems in overbuild areas often have rates that are artificially low:

> There is a long tradition of such attempts at 'greenmail' by cable overbuilders, and its effect is to suppress prices to levels that could not over the long term, support cable operations and, in particular, could not support the investment in maintenance, programming and technology that is necessary to the sustenance of cable television.[17]

Given the circumstances in which systems subject to overbuilds operate, it is more likely that the rates for these systems are too low than it is that the rates for systems in low penetration markets are too high. Under this reasoning, the data from systems with multiple providers in the market should be excluded, perhaps justifying a smaller comparative rate differential or no differential at all. In sum, there is no legal basis for the Commission to disregard rate data for systems with low penetration levels in setting benchmarks and at the same time ignore the fact that markets with

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16/ See note 2 and accompanying text, supra.

17/ Comments of the National Cable Television Association at 18-19. Both Congress and the Commission have acknowledged the existence of this practice. See, e.g., House Report at 45 ("The Committee further notes the existence of 'greenmail' as an impediment to growth in the number of secondary cable systems. In a 'greenmail' scenario, the aim of the overbuilder is not to build and run a competing system, but to receive payment from the existing operator in exchange for the existing market"); Report and Order, Appendix E at ¶ 32 ("If, for instance, some community units in competitive markets are facing price wars, their prices may be below cost and may not be sustainable in the long run").

multiple providers may not be making a reasonable profit, a statutory consideration dictated by both Sections 623(b)(2)(C)(vii) and 623(c)(2).[18/]

IV. THE BENCHMARK SCHEME PERVERTS CONGRESSIONAL INTENT BECAUSE IT FORCES RATES BELOW REASONABLE LEVELS.

The Report and Order states that "basic service rates that exceed the system's benchmark level at the time regulation begins are presumptively unreasonable because they exceed the average rates charged by systems subject to effective competition." Report and Order at ¶ 217 (emphasis added); see also Appendix E at ¶ 33. Even if there were evidence that the systems the Commission surveyed achieve adequate rates of return, the average rate of systems subject to effective competition is a logically flawed benchmark.[19/]

The average rate, by definition, blends rates of all systems subject to effective competition, including those with rates that exceed the benchmark. Thus, where that "average" is used to calculate benchmarks, at least some systems that face effective competition are charging above benchmark rates. Were those systems not exempt from regulation they would be subject to rollbacks. Likewise systems not subject to

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18/ In addition, the benchmarks fail to consider another significant factor: the especially high costs of compliance with the rules. Cable operators already have incurred enormous costs in their efforts to effectuate the new requirements and many equally significant costs remain. The failure of the benchmarks to account for these very substantial costs penalizes cable operators heavily.

19/ The survey did not request any information about profits. Report and Order, Appendix E. As a consequence, the Commission lacks any evidence that systems subject to effective competition make any money. As shown above, there is substantial evidence that such systems typically lose money. See Part III, supra.

effective competition could face rollbacks for charging the same rates as similar, but "competitive," systems with above benchmark rates.

This anomaly contravenes the stated goal of the provision that rates not exceed those that "would be charged for the basic service tier if such cable system were subject to effective competition." 47 U.S.C. § 543(b)(1). The Commission exceeded its statutory authority by adopting regulations that ensure some subscribers will pay rates lower than those paid by subscribers in areas subject to effective competition. Or, stated another way, under the Commission's regulations the rates paid by subscribers in some areas subject to effective competition are higher than the benchmark rates.

All rates subject to effective competition are presumptively reasonable, including those above the average rate. The Commission articulates no reason why the "average" rate is the appropriate level for setting benchmark rates. To the extent that the Commission's survey data is relevant to determinations of reasonable rates, the proper point for setting benchmark rates is an articulable point above the average. Because the benchmarks adopted by the Commission are flawed, and adoption of the Further Notice would accentuate these flaws, the Commission may not rely upon this analysis to reduce the benchmarks further.

V. FURTHER ROLLBACKS WOULD HAVE A DEVASTATING IMPACT ON CABLE SYSTEMS AND CABLE SUBSCRIBERS.

One of the stated policy objectives of the 1992 Cable Act is to "ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems." 1992 Cable Act, Section 2(b)(3). An overall rollback of rates of almost 28 percent, which would be the result of adopting the proposal in the Further Notice, would make it impossible for cable operators to expand services; it also would drive a number of operators into insolvency. Simply put, no business can absorb the blow of losing more than one-quarter of its revenues.

A cable system, like any business, makes long-term decisions based on historical revenues and estimated future revenues. This may mean, for example, taking on additional debt to finance service expansion and system upgrades. Larger rate rollbacks may make it impossible to meet the payments on the debt already assumed to finance such upgrades, let alone the incurrence of additional debt. As one commenter in this proceeding pointed out:

> The credit facilities that most operators rely on to finance operations and program acquisition include debt-to-cash flow covenants and interest-coverage covenants that operators must meet or fall into default. Sudden, sharp reductions in projected revenues . . . could significantly reduce cash flow to the point where it impedes the cable industry's financing and impair its overall condition. . . . Financial uncertainty would also drive up the cost of new financing, and could cause some lenders to cease lending to the cable industry altogether.

Comments of Cablevision Systems Corporation at 15-16.

Rollbacks predicated on 28 percent revenue reductions would quite clearly have an adverse impact on new investment and current operations. Like the reductions already mandated by the Commission, the impact cannot be measured simply as a reduction in total revenue. In fact, a seven percent reduction in revenues translates into a 15 percent reduction in operating cash flow and a 79 percent reduction in free cash flow (that is, money available to repay debt or pay stockholders).[20] A 28 percent reduction in revenues would have a much greater impact, essentially giving the entire cable industry an enormous negative cash flow. Financial effects of the magnitude that would result from a 28 percent rate reduction and the ensuing devastation of current services and future investment in the industry clearly are not in the best interests of subscribers and were not intended by Congress. Such results contravene the 1992 Cable Act's goals and would constitute a punishment that could serve only to bankrupt operators.

The subsidiary effects that would follow from a mandated rate reduction of 28 percent are equally contrary to the public interest. Widespread failures of cable companies would adversely affect the financial community, the 131,000 people employed in the cable industry, the diversity of programming available to consumers and the emergence of competition in the telecommunications marketplace. None of these effects would benefit the public or serve the purposes of the 1992 Cable Act.

It is evident that if the systems are required to roll back their rates nearly 28 percent, virtually the entire industry will suffer a financial catastrophe. Further, in the Report and Order the Commission recognized that some systems' high rates are related to high costs, which will require these high cost systems to engage in expensive cost-of-service showings to avoid drastic cutbacks. Lastly, there is no doubt that under Hope Natural Gas the "end result" of the Commission's proposal is so unfair and unreasonable as to constitute a taking of property proscribed under the U.S. Constitution. See FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).

20/ See Cable TV Investor, May 24, 1993 at 7.

VI. CONCLUSION

The Commission lacks the legal authority to exclude rate data from low penetration systems in calculating its competitive rate differential between regulated and unregulated systems. Congress directed the Commission to consider effective competition in regulating rates and provided an unambiguous definition of the term. Furthermore, there is evidence that data from competitive systems is an inaccurate reflection of reasonable rates. Finally, the current benchmarks are improperly set at the level of average rates of systems subject to effective competition. For all the foregoing reasons, the Commission may not adopt the proposal of the Further Notice.

Respectfully submitted,

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COMCAST CORPORATION
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